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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MAY 3 1 1996

In the Matter of	:	
	:	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	:	**MM Docket No. 92-266**
	:	
Leased Commercial Access	:	**CS Docket 96-60**
	:	

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The record in this proceeding plainly establishes that the Commission's proposal to change the formula for the determination of maximum rates that may be charged for a leased access channel is unsound as a matter of policy. economics and constitutional law The proposed formula can be defended only by adopting a stance which is utterly indifferent to the public interest goals of program diversity and consumer choice that underlie the Cable Act, the economics of the programming marketplace, and the First Amendment. The comments filed by ValueVision International ("ValueVision") are illustrative of those who seek to justify the new approach. Those comments merit brief rejoinder.

That ValueVision treats as irrelevant the impact of the Commission's proposed rate formula upon consumer choice and the overarching Congressional goal of promoting program diversity is clear. Its claim that the existing formula "does not sufficiently promote" the leased access provisions of Section 612 rests solely on the belief that

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ValueVision should not have to bear access costs greater than those charged by cable operators to affiliated home shopping services. ValueVision Comments at 3. It surely cannot be contended that the purpose of the "maximum reasonable rate" requirement of Section 612 was to assure equal cost of access among companies like ValueVision and its home shopping competitors. *Compare* 47 CFR §1301(c).

Moreover, there is much more at stake here than the competitive positioning of home shopping services. In its efforts to gain access to customers, ValueVision simply ignores the impact of the proposed formula on emerging entertainment and information networks. The purpose of the "maximum reasonable rate" standard should be to assure that cable operators do not irrationally deny access to leased access programmers who are willing to pay market-based rates. By contrast, the sole purpose of the proposed rule is to equalize competition in the home shopping marketplace and artificially stimulate demand for leased access by LPTV stations. The inevitable consequence of that formula will be the replacement of highly valued cable services with leased access services which are of less value to consumers. *See*, Charles River Associates Analysis, accompanying Comments of TCI at 15-17. This diminution of consumer welfare cannot be reconciled with the Cable Act in general and Section 612 in particular.

ValueVision's position equally ignores the economics of the cable programming marketplace. It insists upon an unqualified "right" to the benefits of carriage on a tier, but is unwilling to pay the premium that other programmers have paid -- through arms-length bargaining with cable operators -- for such carriage. ValueVision Comments at 23. In one respect the NPRM is right: for many types of services, tiers are more valuable than à la carte carriage because tiers have the "highest subscriber penetration." NPRM at ¶119. *See also,* Comments of NCTA at 16-18. That the proposed formula completely ignores these value of service considerations is itself economically irrational. That leased access programmers have a "right" to a free ride on the value that cable operators and cable networks have created in tiers is indefensible as a matter of economics and law.

Lastly, ValueVision pays no attention to the constitutional implications of the formula the Commission has advanced. In a very real sense, the policy, economic and constitutional considerations converge, compelling the conclusion that the cost-based formula should be rejected. To the extent that the "maximum reasonable rate" requirement has a constitutionally defensible purpose, it is only to assure that cable operators do not irrationally deny access to commercial leased access programmers that are willing to maintain or enhance consumer welfare through payment of market-based access costs. There is simply no substantial governmental interest in a formula which forces cable operators to choose between services that are highly valued by consumers on the one hand, and leased access programmers unwilling to pay prevailing market rates for access on the other. By contrast, a market-based standard -- such as that embodied in the highest implicit net fee rule -- comes closer to satisfying First Amendment tests because it is narrowly tailored to the limited governmental purpose of the "maximum reasonable rate" provisions of Section 612, *see, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 64 U.S.L.W. 4313, 4326 (May 13, 1996) (O'Connor, J. concurring).

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